IN THE

Supreme Court of the United States

OCTOBER TERM—1945

No. 983

AGWILINES, INC.,

Petitioner,

against

M/S SAN VERONICO, her engines, etc., EAGLE OIL & SHIPPING CO., LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

CHAUNCEY I. CLARK,
EDWARD A. NEILEY,
WILLIAM E. COLLINS,
Counsel for Petitioner.

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Agwilines, Inc., respectfully shows:

The petitioner seeks to review the determination by a divided Court (R., pp. 66-78) of the Circuit Court of Appeals for the Second Circuit, affirming the decree of the District Court for the Southern District of New York (R., p. 58) which confirmed the report of a commissioner in a suit in admiralty (R., pp. 37-52), disallowing in part a claim of petitioner for damages due to the detention of its steamship *Agwidale* as a result of a collision between that vessel and the respondent's motorship *San Veronico*.

Statement of the Matter Involved

Petitioner libeled the *M/S San Veronico* for damages sustained by its steamship *Agwidale* in collision with the *San Veronico* on June 5, 1943 (R., pp. 2-4). By agreement, an interlocutory decree (R., p. 5) was entered in favor of petitioner for 85% of its provable damages with an order of reference to a commissioner to take evidence and report. By stipulation submitted to him, all facts were agreed (R., pp. 8-10).

The only question before the commissioner was the important question of law as to the amount which petitioner should recover for the detention of its time chartered vessel for the period of nine days during which she was admittedly out of service as the proximate result of the collision.

The *Agwidale* was, at the time of collision, under time charter (R., pp. 11-37) to the United States as represented by War Shipping Administration, and pursuant to the terms thereof (Clause 4, R., pp. 19-21), her owner was paid only half charter hire during the period of collision repairs. It was paid full charter hire by War Shipping Administration for an additional period, included in the total, of nine days during which the *Agwidale* was awaiting convoy (R., p. 9). The owner of the *San Veronico* contended and the commissioner and the Courts below held, that petitioner's recovery for the loss of use of the *Agwidale* was limited to the amount of hire which was deducted by the War Shipping Administration pursuant to the above cited charter provisions in cases of collision damage, plus certain expenditures for fuel and water, which under the charter terms, it was also obliged to bear and for which it had not been reimbursed.

As stated by the Circuit Court of Appeals (R., p. 67), the statement of the commissioner, based on the agreed stipulation, is not disputed as a correct statement of the facts, so that the sole question before the Courts below was one of law.

Jurisdiction

The jurisdiction of this Court to entertain this petition and to grant it is provided by Section 347 of Title 28 of the U. S. Code.

Question Presented

The sole question is whether the recovery of a shipowner for the loss of use of his vessel due to collision is to be reduced by the amount of payments received by him pursuant to a charter agreement with a third person, or whether, as petitioner contends, the tort feasor is not entitled to reduce his liability by reference to such a contract, which is as to him *res inter alios acta.*

Rulings of the Courts Below

The commissioner *held,* that in cases involving the detention of chartered vessels, the charter hire is *the* measure of damages rather than a *prima facie* basis for determining such damages; that the claim therefore was for charter hire and to the extent that libelant had been paid partial hire by the United States it had sustained no loss; thus treating the claim as one for special damages (R., pp. 41, 43). The commissioner rejected as inapplicable to a

contract for the hire of a ship (R., p. 49), the authorities cited *infra,* and discussed at length in the opinions of the Circuit Court of Appeals, particularly the dissenting opinion of Clark, C. J. (R., pp. 68, 74), holding that a tort feasor is not concerned in the determination of his liability with the benefits received by his victim from payments made by a third person, whether pursuant to contract or otherwise. The District Court similarly held, in a brief opinion, adopting the commissioner's report, that these authorities "are not really applicable to a technical admiralty situation" (R., p. 57).

The Circuit Court of Appeals (all three judges concurring on this point) properly disagreed with the ruling of the lower Court, as embodied in the commissioner's opinion, that the charter hire is *the* measure of the damages sustained by a time chartered vessel and held that the proper measure is the value of the use of the vessel of which in this case the charter hire was the only evidence (R., pp. 69, 71). As the Court held, in the case of chartered vessels, the charter hire is only *prima facie* evidence of the value of the vessel's use. *The Yaye Maru,* 274 Fed. 195, 200 (C. C. A. 4); *The Brand,* 224 Fed. 391, 394-5 (C. C. A. 3).

The majority of the Court held, however, that the petitioner had sustained no loss except to the extent of the deduction of charter hire (R., pp. 68-9). It, therefore, treated the suit as a claim by the charterer for damages due to the collision. Thus viewing the claim, the majority of the Court felt reluctantly bound by the opinion, if not the decision of this Court in *Robins Dry Dock & Repair Company* v. *Flint,* 275 U. S. 303, and suggested that if any change is to be made in what the Court conceived to be the law, this Court should make it (R., pp. 69-71).

Circuit Judge Clark in a very full dissenting opinion expressed the view that this Court did not decide the question in the *Robins Dry Dock* case, but indicated, on the contrary, that a claim for the damages here involved should be sustained (R., pp. 71-3). The dissenting opinion further observes that the majority is in conflict with the well settled principle of the law of damages as recognized in the decisions of other Circuit Courts of Appeal that the tort feasor cannot reduce the amount of his liability by the sum of payments received by his victim from collateral sources (R., pp. 74-6).

It is submitted that the majority opinion below, after recognizing the principle, erred in failing to apply it to the facts presented.

Reasons for Granting the Petition

1. The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court. In *Propeller Monticello* v. *Mollison,* 17 How. 152, 155; *The Cayuga,* 14 Wall. 270; *The Favorita,* 18 Wall. 598, 603, this Court held that the tort feasor must make satisfaction for the wrong he has done, irrespective of arrangements made by his victim to which he is not a party. See also *National Labor Relations Board* v. *Marshall Field & Co.,* 129 Fed. (2) 169, 172 (C. C. A. 7); aff'd *per curiam, Marshall Field & Co.* v. *Board,* 318 U. S. 253.

2. If the decisions just cited are not controlling, the Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Court. While the decisions just cited were relied on in the dissenting opinion of Judge Clark,

the majority of the Court felt bound, with evident reluctance, by the decision of this Court in *Robins Dry Dock* v. *Flint, supra,* relying upon certain language of this Court's opinion in that case. The dissenting opinion, on the other hand, relies on certain other language of the opinion for its view that this Court's decision did not preclude recovery on petitioner's claim but, in fact, suggested that such recovery was possible in a proper case. There is thus a question as to the scope of this Court's decision in the *Robins* case which should be clarified.

3. The Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeal on the application of a fundamental principle of damages. *S. H. Kress Co.* v. *Bullock Shoe Co.,* 56 Fed. (2) 713 (C. C. A. 5); *Chicago etc. Transit Co.* v. *Moore,* 259 Fed. 490, 505 (C. C. A. 6); certiorari denied; 251 U. S. 553. (See annotation 128 A. L. R. 687.) *National Labor Relations Board* v. *Marshall Field & Co.,* 129 Fed. (2) 169, 172 (C. C. A. 7); aff'd *per curiam, Marshall Field & Co.* v. *Board,* 318 U. S. 253.

The cases cited apply the rule that the tort feasor's liability is not to be cut down by consideration of amounts received by him whom he has wronged either by way of gift or as a result of contract which he has had the wisdom to make. The majority and minority opinions below explicitly recognize the validity of this doctrine as set forth in Restatement, Torts, Section 920 (e), but the majority does not apply it. The rules of damages in admiralty are not *sui generis* but merely a part of the common law of damages. *The Cayuga,* 14 Wall. 270; *The Argentino,* 14 Appeal Cases (House of Lords) 519; *Roscoe, Damages in Maritime Collisions,* Third Ed., page 1; *The*

Law Times, Volume 159, page 301. See also *31 Michigan Law Review,* page 978.

4. The question presented is one of great importance to the admiralty bar and the shipping industry. Many other cases involving large sums of money depend upon the decision.

AGWILINES, INC.,
By CHAUNCEY I. CLARK,
EDWARD A. NEILEY,
WILLIAM E. COLLINS,
Counsel.

New York, N. Y.,
March 18, 1946.

Certificate

We hereby certify that we have examined the foregoing petition; that in our opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

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New York, N. Y.,
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IN THE

Supreme Court of the United States

OCTOBER TERM—1945

AGWILINES, INC.,

Petitioner,

against

M/S SAN VERONICO, her engines, etc., EAGLE OIL & SHIPPING CO., LTD.,

Respondent.

BRIEF IN SUPPORT OF PETITION

1. The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court.

In *Propeller Monticello* v. *Mollison,* 17 How. 152, 155, an admiralty case, this Court said:

> "The respondent is not presumed to know, or bound to inquire, as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done."

The same principle was recognized and applied in *The Cayuga,* 14 Wall. 270, where the Court sustained the allowance in an admiralty cause for the value of the use of a ferryboat damaged in collision and held that the tort feasor could not take advantage of the fact that the owner used another ferryboat which was kept for emergencies and used while the injured vessel was being repaired.

The Court approved the "explanations" of the Circuit Court which said, 5 Fed. Cas. page 329, 331 (case No. 2,537):

> "It is quite obvious, that there is neither justice nor equity in allowing to a tort-feasor the benefit of this large outlay made by the libellants to enable them to serve the public and run their ferry without interruption; and yet that is the effect of yielding to the argument that, because such spare boat was already in the libellants' possession, and was used, therefore the libellants sustained no pecuniary loss by the delay."

To the same effect is the *Favorita,* 18 Wall. 598, 603. The Court in *Marshall Field & Co.* v. *Board,* 318 U. S. 253, affirmed in a *per curiam* opinion, *National Labor Relations Board* v. *Marshall Field & Co.,* 129 Fed. (2) 169, 172 (C. C. A. 7), where it was said:

> "The wrongdoer may not be benefitted by collateral payments made to the person he has wronged."

The majority opinion below did not discuss these decisions but felt precluded from awarding to libelant its full damages by this Court's decision in *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U. S. 303 (1927). (The commissioner considered this decision as only a related one but not in point.) (R. 39) We do not consider the *Robins* case controlling, but any question concerning it should be clarified by this Court.

2. If, as we contend, the foregoing decisions do not determine the question, there remains this important question of Federal law which has not been, but should be, settled by this Court, particularly in view of the doubts expressed below as to the scope of this Court's decision in the *Robins* case.

The principal question raised by the Circuit Court of Appeals is whether recovery by petitioner of its full damages is barred by the *Robins* case. The majority of the Circuit Court of Appeals considered that it was. Circuit Judge Clark definitely thought otherwise. The majority and minority opinions quoted, in support of their divergent views, different passages from the opinion of this Court by Justice Holmes in that case.

Petitioner submits that the *Robins* case did not decide the question here raised. There, the *SS Bjorneford* had been damaged while under repair in the Robins Dry Dock, through the negligent dropping of her propeller and time was lost while a new one was being installed. The *Bjorneford* was under a time charter to Flint & Co. Her owner claimed against the dry dock company for its damages, was paid and executed a release. Flint & Co., charterers, who had been relieved from payment of charter hire during the period of delay, brought this independent action to recover their loss, since during the war period (1917) charter rates had risen and the charter hire did not properly measure the value of the ship's use. This Court held that the charterers had no cause of action against the dry dock company. They were not parties to the contract for the repair of the ship, and had no standing to sue. As the Circuit Court of Appeals in the case at bar interpreted the decision, "Interference by a third person with the performance of a contract was an actionable wrong only if it was intentional". The *ratio decidendi* further appears from the reference by Justice Holmes as "a good statement, applicable here", to *Elliott Steam Tug Company, Ltd.* v. *The Shipping Controller* (1922), 1 K. B. 127, 138, 143, where the Court said:

> "In case of a wrong done to a chattel the common law does not recognize a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel."

The *Robins* case was brought as "a case of contract and damage" (275 U. S. at page 307).

The majority of the Circuit Court of Appeals in the case at bar concluded its discussion of the *Robins* case with the following comment:

> "The Court thought it irrelevant that this resulted in exonerating the drydocker from nearly all liability through the fortuity that the profitable use of the ship had been divided between the owner and charterer: the difficulty went deeper; the drydocker had committed no legal wrong against the charterer at all, though he had caused it serious damage.
>
> Perhaps it was not necessary after so holding to consider our argument that the owner might be treated as suing on behalf of the charterer; but the Court did so and definitely repudiated it, as appears by the passage from the opinion on page 309, which we quote in the margin.* In the face of this decision we cannot see how we can do otherwise than affirm the decree at bar; if any change is to be made the Supreme Court must make it."

The dissenting opinion of Circuit Judge Clark reads the *Robins* opinion differently and after pointing out that the action there was by the charterers and that the owner of the vessel had already settled with the tort feasor, takes the view that the owner of the *Bjorneford,* except for hav-

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* "The whole notion of such a recovery is based on the supposed analogy of bailees who if allowed to recover the whole are chargeable over, on what has been thought to be a misunderstanding of the old law that the bailees alone could sue for a conversion and were answerable over for the chattel to their bailor. Whether this view be historically correct or not, there is no analogy to the present case when the owner recovers upon a contract for damage and delay."

ing settled with the tort feasor, could have sued for his full damages, and quoted the following from this Court's opinion in support:

> "The respondents have no claim either in contract or in tort, and they cannot get a standing by the suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents."

The majority opinion also cites *Chargeurs Reunis, etc.* v. *English & American Shipping Co.*, 9 Lloyd's List L. R. 464.

In this case, which, as the dissenting opinion below points out, is not reported officially, not only was there no discussion of the general principle of damages on which petitioner here relies, nor any thorough discussion of the issues, but factually the case is quite similar to the *Robins* case in that as the judges observed, the owner of the chartered vessel had been allowed his full damages and an attempt was then made to recover the charterer's losses as the subject matter of a distinct claim. The case does not deal with the question presented here whether the wronged person can have his ordinarily allowable damages reduced for the benefit of the wrongdoer by reference to collateral matters.

The dissenting opinion below also clearly points out (R., p. 73) that the *Robins* decision might well be supported on the further ground that to have permitted additional suit by the charterer would have resulted in subjecting the wrongdoer to multiplicity of actions, a difficulty no longer existing under modern principles of joinder where all interested parties can be brought in. As Judge Clark said:

> "The objection to any other course is that it puts difficulties in the way of funneling the money to the

> parties ultimately entitled thereto, all for the mere procedural advantage of a defendant who should be interested only in his own protection, not in the destination of the money."

If the majority opinion is to prevail, it amounts to applying to an admiralty case, a rule of damages different from that prevailing in common law actions, although admiralty damages are part of the general law on the subject and governed by the principles of common law actions.

In *The Cayuga,* 14 Wall., this Court said at page 278:

> "* * * it is settled law that the damages which the owner of the injured vessel is entitled to recover in cases of collision are to be estimated in the same manner as in other suits of like nature for injuries to personal property, and the owner, as the suffering party, is not limited to compensation for the immedidate effects of the injury inflicted, but the claim for compensation may extend to loss of freight, necessary expenses incurred in making repairs, and unavoidable detention."

In the *Argentino,* 14 Appeal Cases (House of Lords) 519, a collision suit involving claim for detention damages, Lord Herschell said:

> "It is admitted that there is no special rule of the Admiralty Court governing the question, and that the law there administered in relation to such a matter is the same as prevails at common law."

And Lord Fitzgerald further observed:

> "It is to be regarded in the light of a common law action brought by the owners of the *Argentino* against the vessel in collision."

See also *Roscoe, Damages in Maritime Collisions,* Third Ed., p. 1, and *The Law Times,* Volume 159, page 301, also *31 Michigan Law Review,* page 978.

In this connection both opinions below (R., pp. 68, 74-5) adopted as a correct statement of the law, Restatement, Torts, Section 920 (e):

> "The Plaintiff is not barred from recovery merely because he suffers no net loss from the injury, as where he is insured or where friends make contributions to him because of the loss. If his things are tortiously destroyed, the insurance carrier is subrogated to his position. In other cases the damages which he is entitled to recover are not diminished by the fact that either as a matter of contract right or because of gifts, the transaction results in no loss to him."

The decision below did not apply this doctrine. The attempted distinction is unsound. It was the ruling of the Court that this petitioner, as owner of the *Agwidale,* had no claim for damages for the loss of her use, because by the charter agreement, petitioner had parted with the use to the United States. This, however, is in definite conflict with the statement of principles *supra* which the Court recognized as correct. The ruling infringes upon that principle because it takes into consideration for the benefit of the wrongdoer, a contract between petitioner and a third party with which he is not concerned. To insist that in the circumstances, petitioner suffered no "pecuniary loss" is, as the dissenting opinion points out, "mere question begging" (R., p. 75). The question is, whether the wrongdoer may invoke reference to the contract at all in determining that question.

3. The decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeal on the application of this fundamental principle of damages.

The majority opinion below cited some of these cases and accepted their doctrine, but, as we suggest, did not apply it. It has been applied in other Circuits to a variety of situations as pointed out in the full discussion of the law in the dissenting opinion. Thus for example in *S. H. Kress Co.* v. *Bullock Shoe Co.*, 56 Fed. (2) 719 (C. C. A. 5), it was held that an owner's right to damages for injury to his buildings was not affected by the fact that under the terms of his lease the tenant was required to continue payments. The doctrine has been applied not only to instances of compensation received from an insurance company, but to those received under a state compensation act. *National Labor Relations Board* v. *Marshall Field & Co.*, 318 U. S. 253. See also *Overland Contract Co.* v. *Sydnor*, 70 Fed. (2) 338 (C. C. A. 6). Indeed the Circuit Court of Appeals for the Second Circuit applied it to payments under the Railroad Retirement Act, *McCarthy* v. *Palmer*, 113 Fed. (2) 721; certiorari denied, *Palmer* v. *McCarthy*, 311 U. S. 680.

The majority opinion also disregarded its own specific holding, as the dissenting opinion observes (R., p. 76) in *Pool Shipping Co.* v. *U. S.*, 33 Fed. (2) 275, where in reliance upon the same principle, the Court held that in a collision suit filed by the owner of a vessel, payments in general average made to it by the owner of cargo could not be used *pro tanto* by the wrongdoer in reduction of his damages.

4. The authoritative decision of the question is of great importance to the admiralty bar and to the shipping industry, and will determine controversies in many other cases involving large sums. An affidavit filed on behalf of petitioner in support of earlier argument in the Circuit

Court of Appeals asserted without contradiction from respondent that the amount involved in cases presenting the same question is in excess of $1,000,000. The United States, whose interest in the controversy is apparent, operated hundreds of vessels during the war for over two years under similar charters as to which the same question has arisen and will arise.

The practical result of the decision below gives the wrongdoer an undeserved windfall. If he may properly contend that the owner of a vessel, which is completely on-hire in such circumstances, has suffered no damage, the net result is that the charterer has lost complete use of the vessel for which he has paid and the wrongdoer, through benefit from a contract with which he is not concerned, entirely escapes responsibility for the damage done.

CONCLUSION

The question raised by this application should be definitely settled by this Court.

Wherefore, petitioner respectfully prays that a writ of certiorari issue out of this Honorable Court, to the Circuit Court of Appeals for the Second Circuit, to review said cause.

CHAUNCEY I. CLARK,
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WILLIAM E. COLLINS,
Counsel for Petitioner.

(PD-9788)

IN THE

Supreme Court of the United States

OCTOBER TERM—1945.

No. 963.

AGWILINES, INC., as owner of Steamship *Agwidale* and on behalf of any others interested in said vessel, her use and operation,

Petitioner,

against

Motorship *Eos* [illegible], her engines, etc., [illegible] & [illegible] Company, [illegible]

Respondents.

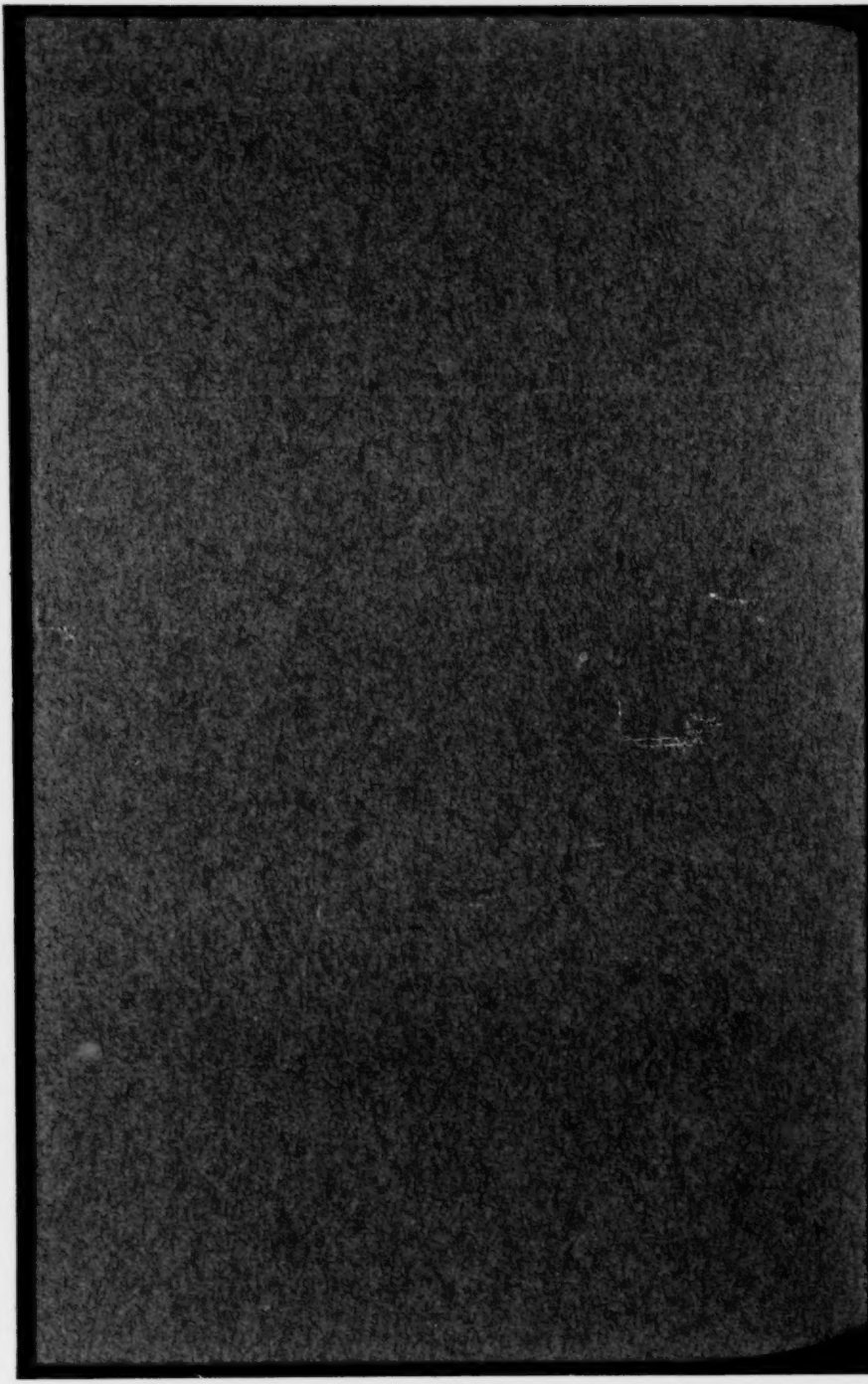
BRIEF IN OPPOSITION TO [illegible] OF CERTIORARI TO THE [illegible] COURT OF APPEALS FOR THE [illegible]

[illegible]

H[illegible] C[illegible],

of Counsel.

[illegible]



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IN THE

Supreme Court of the United States

OCTOBER TERM—1945.

No. 983.

AGWILINES, INC., as owner of Steamship *Agwidale* and on behalf of any others interested in said vessel, her use and operation,

Petitioner,

against

Motorship *San Veronico,* her engines, etc.
EAGLE OIL & SHIPPING COMPANY, LTD.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petition seeks a review of the decision of the Circuit Court of Appeals for the Second Circuit, R. 66-69, affirming the decision and opinion of United States District Court for the Southern District of New York, R. 54-57, and final decree thereon, R. 58-60, which confirmed the report of the Commissioner, R. 37-52.

PRINCIPAL FACTS

On June 5, 1943 M. S. *San Veronico,* owned by respondent, collided with S. S. *Agwidale,* owned by petitioner. The *Agwidale* sustained damages and was out of service for 9 days. Five days, 7 hours, 10 minutes of that detention period was for repair of the collision damages, most of the balance was consumed in waiting for the next convoy.

At the time of the collision the *Agwidale* was under a time charter between petitioner and the United States. R. 11-37. Pursuant to the break-down (off-hire) provisions of Clause 4 of that charter, R. 19-20, the United States paid to petitioner the sum of $7,725.65 as charter hire with respect to the detention period. R. 9-10. That payment consisted of one-half the charter rate for the repair period of about five days and full charter hire for the balance of the period of detention.

All items of damages sustained by petitioner with respect to the *Agwidale* were agreed except the one disputed item here involved, viz., the amount of money which petitioner is entitled to recover for detention of the *Agwidale.*

The parties agreed that petitioner was entitled to recover 85% of its *provable* damages and interlocutory decree to that effect was entered on consent of respondent. R. 5.

DECISION BELOW

Respondent conceded from the outset that with respect to detention damages of the *Agwidale,* it was liable to petitioner for the agreed percentage of the sum of $3,457.03, consisting of $3,216.91 charter hire not received with respect to the repair period, and $240.12 for fuel and water consumed by the vessel during the repair period and paid for by petitioner. R. 10.

The claim of petitioner as to the disputed item is, in addition to all other damages agreed, for such sum as will give petitioner the agreed percentage of the sum of $10,942.56 for 9 days' loss of use, measured by the full charter rate, there being no other evidence as to the value of the loss of use, and in addition, the expenses paid by the time charterer.

Respondent contended throughout, and its contention was sustained below, that petitioner could not recover the amount of charter hire received from the United States as time charterer of the *Agwidale*, nor the amount of expenses paid by the time charterer.

The issue was resolved against petitioner both by the Commissioner appointed by the District Court, by the District Court in affirming the Commissioner's report, and by the Circuit Court of Appeals for the Second Circuit.

It was held throughout that petitioner's provable damages with respect to the disputed item should be limited to its *actual pecuniary loss*, viz., the amount of charter hire with respect to the repair period *not* received from the United States by reason of the provisions of Clause 4 of the Time Charter, $3,216.91; and fuel and water paid for only by petitioner during the repair period, $240.12, a total of $3,457.03, all as conceded from the beginning by respondent.

QUESTION

The sole question on this application is whether a shipowner who has transferred the use of his vessel to another by time charter at a specified rate of charter hire, is nevertheless entitled to recover at the full charter rate for detention of the vessel, regardless of the amount of charter hire actually received with respect to the detention period, with the time charterer's expenses added.

BASIC PRINCIPLES

By a contract of time charter the owner transfers to the charterer the right to use the vessel and is thereafter not interested in whether or not the vessel is used at all. It follows that his only interest is in the receipt of the amount of charter hire which the time charterer has agreed to pay to the shipowner for the right to use the vessel; and that only in respect of time charter hire and direct expenses does the shipowner sustain any damages whatever if the use of the vessel is interrupted in consequence of collision.

> *F. A. Tamplin S. S. Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.*, (1916), 2 A.C. 397, 426;
>
> *N. S. Byonnes & Son, etc.* v. *United States*, (SDNY,1923) 298 Fed. 123.

The time charterer of a vessel has not any property right in, interest in, nor possession of, the vessel. He has nothing but a contract right to the use of the carrying capacity of the vessel.

> *Robins Dry Dock & Repair Co.* v. *Flint, et al.*, (1927) 275 U.S. 303.

The payments of charter hire made by the United States to petitioner were not payments under a contract of insurance, nor were they in the nature of a contribution, gratuity or gift with respect to a loss. Thus all cases which hold that a tort feasor must respond in full without benefit of insurance payments, gratuities or gifts do not apply. Cases in that class are relied on by petitioner, both in petition and brief, as follows:

> *The Propeller Monticello* v. *Mollison*, (1854) 17 How. 152;

National Labor Relations Board v. *Marshall Field & Co.*, (CCA7,1942) 129 F.(2d) 159; aff'd. *per curiam, Marshall Field & Co.* v. *Board*, (1943) 318 U.S. 253;

Overland Construction Co. v. *Sydnor*, (CCA6, 1934) 70 F.(2d) 338;

McCarthy v. *Palmer*, (CCA2,1940) 113 F.(2d) 721, certiorari denied, *Palmer, et al.* v. *McCarthy*,(1940) 311 U.S. 680;

Pool Shipping Co. Ltd. v. *United States*, (CCA2, 1927) 33 F.(2d) 275.

The distinction is between a payment which *prevents* a loss and a payment which *reimburses* a loss. The whole question turns on whether or not the payment received from the third party is one of indemnity, collateral contribution or gratuity with respect to a loss. If it is, the payment does not affect the plaintiff's claim against the tort feasor. Otherwise, the plaintiff does not suffer any loss to the extent of such payment.

This was specially recognized in a case heavily relied on by petitioner, *National Labor Relations Board* v. *Marshall Field & Co.*, (CCA7,1942) 129 F.(2d) 169, 172; affirmed *per curiam*, *Marshall Field & Co.*, v. *Board* (1943) 318 U.S. 253. There the decision below, approving the Board's order directing that the employees recover their wages lost during the period of discriminatory discharge less net earnings, pointed out the distinction between earnings and unemployment insurance benefits, and held that the latter did not affect the claim. This Court affirmed that decision. See also,

Drinkwater v. *Dinsmore*, (1880) 80 N.Y. 390, 392;

Clarke v. *Eighth Ave. R. R. Co.*, (1924) 238 N.Y. 246, 253;

Riggle v. *Jackson et al.*, (1931) 112 Cal. App. 428; *Town of Walden* v. *Clarke*, (1877) 50 Vt. 383.

The District Judge correctly pointed out that the amount of charter hire paid by the United States to petitioner was not a payment of insurance; that it was fixed by agreement between the parties beforehand and had no relation to the actual damages or to their cause. R.56.

Unlike an insurance payment or a gratuity with respect to the loss, the reduced amount of hire paid, (being part of the full hire which would have been due if the vessel had not been disabled) was payable at all events, collision or no collision.

NATURE OF THE CLAIM

The original libel was filed, and sought recovery, by Agwilines, Inc., as owner of the Steamship *Agwidale* and *on behalf of any others interested in said vessel, her use and operation.* R.2-4.

But as the case developed and the effect of the decision of this Court in *Robins Dry Dock & Repair Company* v. *Flint et al.*, (1927) 275 U.S. 303 (hereafter referred to as the *Robins* case) became clear, petitioner straddled the issue, as reflected in the prevailing opinion below. R.67-68.

Thus, petitioner has been careful to keep away from any definite statement as to whether this is a claim of the shipowner in its own right, or a representative claim by the shipowner on behalf of the time charterer.

In either event the claim is invalid.

If the claim is made in its own right as shipowner, petitioner did not sustain any damages by loss of use of the *Agwidale*, nor by the charterer's expenses. Petitioner, as shipowner, was not entitled to the use of the vessel,

having transferred it to the United States by time charter. The observations of the prevailing opinion below, R.67-68, on this subject were not questioned in the dissenting opinion, nor are they contested in the petition. The physical damages, the expenses paid by petitioner pursuant to the charter, and petitioner's loss of charter hire by detention of the vessel, all as conceded and allowed below, constituted the only damages which petitioner sustained by reason of the collision.

If the claim is maintained by the shipowner on behalf of the time charterer, for the loss of use of the vessel as put in petitioner's brief at page 17, and for charterer's expenses, the decision of this Court in the *Robins* case is a complete answer. The time charterer has no footing for any such claim. It should not be necessary to argue that a representative action cannot be maintained by one party on behalf of another, where that other has not any right of action at all.

It is clear that if petitioner recovers what it now claims, it will have to pay the money over to the United States as time charterer. No matter what petitioner may contend in legal theory, this claim, as shown by the presence of Government counsel both below and on this petition, is actually by and for the benefit of the United States as time charterer. The time charterer is trying to get around the *Robins* case. It should not be allowed to accomplish indirectly what it cannot do directly.

Petitioner attempts to distort the scope and effect of the *Robins* decision. It is suggested that if the shipowner in the *Robins* case had maintained the claim for the value of the loss of use of the vessel, as later claimed by the time charterers, it could have succeeded. But that contention misses the point that if the charterer had no footing to make the

claim, surely no one else could maintain it successfully on his behalf; and there is not a word in the *Robins* decision which indicates that the charterer's claim was invalid simply because the owner had given a release to the shipyard when the owner's claim was settled. The remarks of Mr. Justice Holmes, stressed at page 13 of petitioner's brief, and by the dissenting opinion below, were not a dictum that if the shipowner had brought such a claim it could have recovered, but merely rejected an unsound contention, as shown by the language which followed. 275 U.S. at p. 309.

At page 12 of petitioner's brief there appears to be a feeble suggestion that the *Robins* case can be distinguished from *Elliott Steam Tug Company, Ltd.* v. *The Shipping Controller* (1922), 1 K.B. 127, because the *Elliott* case spoke of a "wrong" done to a charterer whereas the *Robins* case was brought as a case of "contract and damage." This contention was first made before the Commissioner, later abandoned, and is here resurrected. It is hard to follow because the word "damage" would include whatever claim the injured party had in tort. And in any event Mr. Justice Holmes, in the *Robins* case, thought the *Elliot Steam Tug* case applied because he cited it, and paid no attention to the form of the action. After his statement of the case he said, 275 U.S. at page 308:

> "* * * But as the case has been discussed here and below without much regard to the pleadings, we proceed to consider the other grounds upon which it has been thought that a recovery could be maintained. * * *"

I. THE LAW IS SETTLED.

The legal principles which controlled the decision below are thoroughly established. The decisions of this Court, of the Circuit Courts of Appeals and of the English courts have uniformly laid down the applicable rules.

The proper measure of the damages sustained by a shipowner for detention of his vessel due to collision is the amount of his actual pecuniary loss.

The Potomac, (1881) 105 U.S. 630;

The Conqueror, (1896) 166 U.S. 110,133;

Brooklyn Eastern District Terminal v. *United States (The Integrity)*, (1932) 287 U.S. 170;

The North Star, (CCA2,1907) 151 Fed. 168, 175;

The Winfield S. Cahill, (CCA2,1919) 258 Fed. 318, 321;

Cuyamel Fruit Co. et al. v. *Nedland et al.*, (CCA5,1927) 19 F.(2d) 489, 493;

Newtown Creek Towing Co. v. *City of New York (The Golden Age)*, (CCA2,1928) 23 F.(2d) 486;

Standard Oil Company of New Jersey v. *Glendola S. S. Corporation (The Glendola)*, (CCA2,1931) 47 F.(2d) 206, 208, certiorari denied, 283 U.S. 857;

New Jersey Shipbuilding & Dredging Co. v. *James McWilliams Blue Line, Inc. (The James McWilliams)*, (CCA2,1930) 42 F.(2d) 130,132;

Navigazione Libera Triestina S. A. v. *Newtown Creek Towing Co. (The Isonzo II)*, (CCA2, 1938) 98 F.(2d) 694, 699;

George Nicolaou Ltd. et al. v. *A/B Helsingfors S. S. Co. Ltd. et al. (The Nidarholm)*, (CCA5, 1944) 143 F.(2d) 406;

The time charterer, having not any property right nor interest in, nor possession of, the vessel, has not any footing, apart from statute, to make any claim whatever against a third party who damages the vessel.

Robins Dry Dock & Repair Co. v. *Flint, et al.*, (1927) 275 U.S. 303;

Chargeurs Reunis Compagnie Francaise de Navigation a Vapeur and others (Ceylan) v. *English & American Shipping Company (Merida)*, (C. A., 1921) 9 LL.L.L.R. 464;

Elliott Steam Tug Company, Ltd. v. *The Shipping Controller*, (1922) 1 K.B. 127,135,139-140.

See also *The Federal No. 2* (CCA2,1927) 21 F.(2d) 313.

II. THERE IS NOT ANY GROUND FOR WRIT OF CERTIORARI.

1. No conflict with applicable decisions of this Court.

The cases cited by petitioner as showing such a conflict do not apply. They were cases involving payments to the injured party by way of insurance, or were "spare boat" rule decisions.

The case of *Propeller Monticello* v. *Mollison*, 17 How. 152, 153 involved payment to the injured party under a contract of insurance. It was held that such payments do not affect the claim of the injured party against the tort feasor.

But Petitioner does not here contend that the charter hire payments made by the United States were payments of insurance, nor analogous to insurance payments. Even the dissenting opinion below accepted the point that such payments were not in the nature of insurance, R.72, footnote.

As to *Marshall Field & Co.* v. *Board,* (1943) 318 U. S. 253, as already shown there was the question of the effect of insurance payments (by way of Unemployment Compensation benefits) on the claim of the injured party for damages and this Court reiterated the established rule as to such payments, which does not apply here, because no insurance payment is involved.

Coming to the spare boat decisions cited by petitioner, *The Cayuga,* 14 Wall. 270, and *The Favorita,* 18 Wall. 598 should be regarded as qualified by the later decision of this Court in *Brooklyn Eastern District Terminal* v. *United States* (*The Integrity*), (1932) 287 U.S. 170.

Petitioner has therefore failed to show any conflict whatever between the decision below and decisions of this Court. The weakness of the petition in that respect is clearly recognized by the opening sentence of item 2, page 5 of the petition under the same heading.

2. No important question of Federal law.

Petitioner endeavors to make out that the decision below resolves an important question of Federal law which has not been but should be settled by this Court. It overlooks two points:

1.—that the question here presented is not one of Federal law, but only one of general law of damages. See cases cited at page 14 of petitioner's brief.

2.—that the principles have already been settled by the decisions of this Court.

The Potomac, (1881) 105 U.S. 630;
The Conqueror, (1896) 166 U.S. 110,133;
Brooklyn Eastern District Terminal v. *United States,* (*The Integrity*), (1932) 287 U.S. 170;

Robins Dry Dock & Repair Co. v. *Flint, et al,* (1927) 275 U.S. 303.

The *Robins* case is in accord with English law. *Chargeurs Reunis etc.* v. *English & American Shipping Company,* (C. A., 1921) 9 Ll.L.L.R. 464.

Under this heading petitioner strives for a "clarification" of the *Robins* decision. It does not need any clarification. The fundamental principles there announced and the cases therein cited are unmistakably plain. What petitioner really seeks is to have this Court change the law announced in the decisions above cited. That was recognized by Circuit Court Judge Learned Hand in the prevailing opinion below, R. 69, with a forceful reference to the decision of the English Court of Appeal in the *Chargeurs* case above cited, on facts similar to the case at bar, and to the same effect as the decision below.

3. No conflict with the decisions of another circuit court of appeals on the same matter, nor with the weight of authority.

In a final effort to work out some ground for this petition, petitioner reaches out to unrelated decisions in other circuits and endeavors to make a showing of conflict. *S. H. Kress Co.* v. *Bullock Shoe Company,* (CCA 5,1932), 56 F. (2d) 713 held that the owner of premises damaged by negligence of the defendant was entitled to recover regardless of the fact that the lease on the premises provided for continuing rent without obligation to rebuild. As the action was for damage to the plaintiff's building, (not for loss of rents, which would be parallel to the present case), the Court held, and could hardly otherwise have held, that the provisions of the lease had nothing

to do with the plaintiff's recovery for physical damage to the building. The *Kress* case could apply here only if respondent argued, which it does not and never has, that the payments of charter hire in the present case applied to petitioner's claim for physical damages of the *Agwidale* and expenses incidental thereto.

Next is the decision in *Chicago, etc. Transit Company* v. *Moore*, (CCA6,1919) 259 Fed. 490, certiorari denied, 251 U.S. 553. As petitioner cites page 505 of that decision, we understand that petitioner refers to the claim of the Woodfield sisters, apparently adults. There was a claim for medical and housekeeping expenses incurred by libelants during illness. Those items had been paid by parents of libelants. Apparently respondent sought to defeat recovery on the ground that libelants had not sustained damages in that respect. The authorities therein cited show that the court regarded the payments as gratuities. We have already shown the distinction between cases involving insurance or gratuity payments, and the case at bar.

Petitioner's brief in support of the petition goes further on the subject of conflict between the circuits, and adds citation of further insurance cases. Such cases have already been noted, *ante*, page 5.

III. PETITIONER CONFUSES THE ISSUE.

Petitioner fails to cite a single decision, involving the measure of damages for loss of use of property, at variance with the decision below. It keeps carefully away from the overwhelming body of law cited *ante*, pages 9-10, fixing the proper measure of damages sustained by a shipowner for detention of his vessel due to collision, i.e., the rule of actual pecuniary loss.

Much stress has been laid in the petition, page 6, and petitioner's brief, page 15, on Restatement, Torts, Section 920 (e). There is not and never has been any dispute as to the principles contained in that section of the Restatement. Respondent's position was below, and is here, that the doctrine there announced does not apply to this case because here no question of insurance nor of collateral contribution is involved. Further, the restatement refers to a situation in which "his (the plaintiff's) things are tortiously destroyed". It has been shown that the only party who has suffered any loss of use of the *Agwidale* was the time charterer, not the shipowner, and that petitioner has been made whole for damage to, and detention of, his property.

In this connection the basic weakness of petitioner's position is revealed by the fact that although the petition and supporting brief apparently follow the dissenting opinion below, petitioner is unable to agree with the dissenting judge as to the true incidence of loss. Compare the concluding paragraph of petitioner's brief, where it is clearly stated that it is the charterer who has lost the complete use of the vessel, with the concluding paragraph of the dissenting opinion, where it is just as clearly stated that it is "the prudent and provident shipowner" who is penalized. These contradictory statements demonstrate the utter lack of foundation in petitioner's theory of the case.

Throughout the petition and petitioner's brief and in the dissenting opinion below, there runs the notion that somehow or other petitioner is entitled to "full damages" or "complete compensation". But the whole question is as to what constitutes "full damages" and "complete compensation". On the authorities cited the amount of damages conceded by respondent and stipulated and allowed below

constitute full damages and complete compensation to petitioner because they made good petitioner's actual pecuniary loss. As to the loss of the vessel's use and expenses which the charterer suffered, there is not any legal basis for a claim. Therefore petitioner cannot maintain such a claim on the charterer's behalf.

CONCLUSION.

The petition for writ of certiorari should be denied.

Dated, New York,
April 12, 1946.

Respectfully submitted,

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